THE FORMAL CONTRACT OF EARLY ENGLISH LAW.

Contrary to the view that has sometimes been expressed, we believe that contract formed a very prominent feature of the English legal system prior to the Norman Conquest. In the following paragraphs attention will be drawn to some of the legal sources that support this contention.[1]

In old Teutonic law on the Continent the formal contract appears to have developed gradually out of the still earlier practice of presenting chattels of substantial value and living hostages as security. It became possible for the debtor to bind himself contractually by giving his creditor some chattel of trifling value as a formal pledge[2] and by furnishing at the same time substantial personal security in the shape of sureties. By this transaction the debtor came under the obligation of redeeming the formal pledge —the pledge of trifling value—by the fulfilment of his promise. But, strangely enough, in the ancient law it was the surety, not the debtor himself, who was directly and primarily liable to the creditor for the redemption of the formal pledge; the giver of the pledge, the debtor himself, being in turn directly responsible to his surety. Later the formal contract was freed from this curious conception of suretyship; and by delivering the pledge of trifling value to his creditor the debtor himself assumed a direct liability to his creditor. Apparently this formal contract concluded by the transfer of a valueless object and the furnishing of sureties was first used in the course of legal proceedings, in the settlement of feuds, and in engagements to marry. Not until a subsequent period did the formal contract—and then chiefly by reason of its emancipation from the old suretyship—develop into a form of obligation that was used generally, whenever and wherever it was desired that men should enter into legally binding promises. Grad-

[1]The present short article is based largely upon the writer's *Geschichte des englischen Pfandrechts,* pp. 69-113, 149-164. In those pages will be found a rather full history of the English formal contract, with many citations and discussions of the original sources. It has been suggested to the writer that a summary account might prove of some interest to those who have not access to the longer statement.

Gierke's new and most valuable work on *Schuld und Haftung* (1910) takes into account the Anglo-Saxon sources relating to the formal contract.

[2]The *festuca* was sometimes used for this purpose.

ually, too, forms other than the transfer of a valueless chattel came into use; and although the formal contract originated as a unilateral obligation, the parties, by reciprocally giving and receiving valueless chattels or by other mutual formalities, might also enter into formal contracts of bilateral obligation.[3]

To all seeming this development of the formal contract among Teutonic peoples on the Continent repeated itself in its main outlines in the England of our Teutonic ancestors.[4] In its earliest history the Anglo-Saxon formal contract appears to have been concluded by the delivery of a chattel of no substantial value (*wed, vadium*) and the furnishing of sureties (*borh, plegium*). But other formal acts, in addition to the delivery of a *wed,* soon came to be viewed as sufficient to create a binding contractual obligation; and the formality might thus consist, for instance, in the handgrasp (*on hand syllan*), the oath (*âð, juramentum*), the pledge of good faith (*trŷwa*). Similarly the earliest history of the English formal contract was also bound up with an ancient idea of suretyship; and in England, as on the continent, the formal contract seems to have been first employed in procedure, in the buying off of the blood-feud, and in the engagement to marry.

The laws indicate to us quite clearly, indeed, that three sorts of the formal "procedural contract" were early used in Anglo-Saxon England—the promise by one party to the other that he will appear before the court, that he will furnish proof, that he will satisfy the judgment. Thus, we learn from the laws of Hlothar and Eadric that, if the defendant solemnly promises and furnishes sureties that he will appear before the court, the usual course is for the parties to present themselves before the judge within three days. If the decision goes against the defendant, he must then either satisfy the judgment by payment or else give his solemn promise by oath that he will render satisfaction in the future.[5]

In Edward's and also in Aethelstan's laws we find regulations

[3] With regard to Teutonic development on the Continent see Brunner, *Grundzüge der deutschen Rechtsgeschichte,* 180, 184, 185, 188, 193; Schröder, *Deutsche Rechtsgeschichte,* 286-295; Heusler, *Institutionen des deutschen Privatrechts,* II, 230-253.

[4] In the following foot-notes references to Schmid and Liebermann indicate their well-known editions of the Anglo-Saxon laws. The second edition of Schmid has been used.

[5] Hlothar and Eadric, c. 8-10 (Schmid, 12, 13; Liebermann, 10).

with regard to the defendant's formal promise—backed by providing sureties—that he will furnish proof by means of the ordeal.[6]

The formal contract to pay the *wer-geld,* and thus to buy off the feud, is pictured to us in the tract entitled *Hu man sceal gyldan twelf-hyndes man,*[7] Edmund's doom *Be fachðe,*[8] and chapters 76 and 80 of the so-called *Leges Henrici Primi,*[9] a private treatise on Anglo-Saxon law that comes to us from the period of the Normans. It is clear from these sources that preliminary formal contracts between the murderer and the relatives of the murdered are first concluded by handgrasp (*on hand syllan*), the intermediary in the formation of these contracts being the *for-speca* (*prolocutor*), the representative of the murderer. The murderer promises that he will recompense the relatives of the man he has slain; and they in turn promise the murderer that he may come forward in peace and himself enter into the formal contract for the payment of the *wer-geld.* Then comes the second stage in the proceedings. The parties meet face to face and conclude the formal *wer*-contract itself. By the delivery of a *wed* of trifling value the murderer promises to pay the *wer-geld* to the relatives, and at the same time he furnishes his sureties (*wer-borh*). After the making of this contract by *wed* and *borh* the parties then restore the king's peace by means of their formal promises. Members present from the families of murderer and murdered all place their united hands upon a weapon and solemnly promise (*on waepne syllan*) the arbitrator (*semend, mediator*) that the peace of the king shall be preserved.

Our chief source of information in regard to the Anglo-Saxon engagement to marry is a most valuable tract, *Be wifmannes beweddunge,*[10] which seems to come to us from an early time when the old family law was still in full force.[11] The author of this tract describes the engagement to marry as a formal contract, concluded by *wed* and *borh,* between the man and the relatives of the woman. On his side the man promises that he will protect the woman in accordance with the law of God, that he will pay the *foster-lean,*

[6]Edward, II, 3 (Schmid, 114-117; Liebermann, 142, 143); Aethelstan, II, 23 pr. (Schmid, 144, 145; Liebermann, 162).

[7]Schmid, 394-397; Liebermann, 392-395. This tract seems to come to us from the years 944-c.1060.

[8]Edmund, II, 7 (Schmid, 178-180; Liebermann, 188-191).

[9]Schmid, 475, 476, 478; Liebermann, 593, 596.

[10]Schmid, 390-393; Liebermann, 442-445.

[11]See Schmid, p. LXV. Liebermann (IX, X, 442) holds that the tract comes to us from the years c.970(1030)-c.1060.

and that the woman shall receive the morning-gift and the *dos.* On their side the relatives of the woman promise that she shall be his wife. Each side delivers a *wed* to the other and each side furnishes sureties (*borh*). The friends of the man become his sureties; and that one of the woman's relatives who receives the *wed* from the man is viewed as the surety of the relatives. The contract of engagement (*beweddung*) is performed on the part of the relatives of the woman by formally delivering her over to the bridegroom, this latter act constituting the nuptials (*gifta*). The engagement and the nuptials seem to constitute the two essential acts of the marriage; and the marriage is to be viewed as a form of the "sale-marriage."[12]

Two passages in the laws, one in Ine[13] and one in Alfred,[14] seem to indicate that in the earlier history of the formal contract—in the period when the contract was still bound up with suretyship—the surety was primarily and directly liable to the creditor and the debtor in turn to the surety.[15] From these passages we may perhaps conclude that the *wed*—the object of trifling value, the formal pledge—was first delivered by the debtor to the creditor and then passed by the creditor over to the surety; and, although our Anglo-Saxon sources are silent upon the point, it is probable that the liability of the debtor to the surety signified that the surety, by means of his possession of the *wed,* was entitled to distrain upon the goods of the debtor in case he did not pay.[16]

With its emancipation from this old idea of suretyship the formal contract entered upon a new stage of development. The debtor now furnished no sureties. By the delivery of the *wed* to the creditor, or by means of some other form, such as an oath or

[12]Full details in regard to the Anglo-Saxon law of marriage will be found in the present writer's *Geschichte der Eheschliessung nach angelsächsischem Recht.*

[13]Ine 31 (Schmid, 34, 35; Liebermann, 102, 103). On Ine 31 see the present writer's *Geschichte der Eheschliessung nach angelsächsischem Recht,* 5 (note 7), 7 (note 13), 12.

[14]Alfred 1, § 8 (Schmid, 70; Liebermann, 48).

[15]See also Schmid, 71, 540, and Liebermann, 49.

[16]In the period after the Norman Conquest a third person was sometimes present at the conclusion of the formal contract between the two parties themselves; and sometimes he it was who received the pledge of faith into his own hands. But in this period the third person—sometimes indeed called the *fideiussor*—never took any liability upon himself. Usually he was some official person—such as the bishop or the sheriff—who could officially compel the redemption of the formal pledge by the carrying out of the party's promise. The sheriff, for example, might distrain upon the goods of the party who refused to redeem his pledge of faith.

a pledge of good faith, the debtor entered into a contractual obligation that bound himself alone and that bound himself directly to the creditor. This freedom from suretyship resulted in the transformation of the formal contract into a form of contractual obligation that was not restricted in its use to a limited number of cases, such as the settlement of feuds and the engagement to marry. In its simpler form, freed from suretyship, the formal contract became a general contractual obligation that could be employed in any case where it was desired by the parties to make legally binding promises. Although we cannot be quite certain, owing to the silence of our sources, it is nevertheless probable that in this process of the formal contract's transformation the idea of the debtor's self-suretyship played a role, just as it did in the history of other bodies of Teutonic law. However that may be, we find that Ine's laws[17] speak of formal contracts (*wed, vadium*) in quite general terms, without referring in the slightest way to the necessity for the promisor to furnish sureties. So too it is striking that out of nine paragraphs in Alfred's law *Be a um and be weddum*[18] eight treat of contractual promises by formal pledge (*wed*) or by oath (*â ŝ*) that bind the debtor alone. In this single paragraph there is reference to the exceptional cases where the debtor provides sureties (*borh*) at the time he makes his formal promise by delivery of the *wed*. This paragraph relates expressly to human sureties; but in quite another place in his laws Alfred refers to Godsuretyship (*god-borh, Dei plegium*).[19] Probably this mysterious *god-borh* is to be viewed as a particularly solemn kind of formal promise. The debtor, by his solemn promise, binds himself and himself alone directly to the creditor: he provides no earthly sureties, but he calls upon God to be his surety for the faithful performance of his contract with the creditor.[20] In this form the contract is of course strikingly like the promissory oath and the pledge of good faith.

But the laws of Ine and of Alfred are not the only witnesses to the development of a formal contract binding the promisor himself without the introduction of sureties. In more than one place Aethelred's laws speak, in general terms, of promissory oaths and promises by delivery of *wed;* and everyone is exhorted to abide by

[17]Ine 13 pr (Schmid, 27; Liebermann, 94, 95).

[18]Schmid, 68-71; Liebermann, 46, 47.

[19]Alfred 33 (Schmid, 88, 89; Liebermann, 66, 67).

[20]But Schmid, 89 (note to Alfred 33), views the *god-borh* as "eine Verbürgung unter Anrufung Gottes."

these formal contracts.[21] Cnut's laws also contain similar provisions.[22]

Sufficient has been said to give some idea of the important place occupied by the formal contract in the law of the Anglo-Saxon period; but a still further examination of the sources will also show us that the formal promise had a significance in the church and in the preservation of the king's peace.

Apparently the only passage in the laws in regard to the formal promise in church law is to be found in Aethelred.[23] Aethelred commands all monks to keep themselves free from every sort of evil-doing, on pain of suffering ecclesiastical punishment; and he draws the attention of monks to the solemn promises (*word* and *wed*) they have made to God.

Still more characteristic of the Anglo-Saxon times is the wide employment of the solemn promises as a means of ensuring the preservation of the king's peace. We cannot enter here into the details of this interesting phase of the early history of our law of contract. It must suffice to refer to the classes of persons who thus promised to keep the peace themselves or to see that other persons did this.

Formal contracts with reference to the peace were entered into by kings themselves, by the witan, the associates of the peace-guilds, those who took part in the buying-off of the feud, and by individuals subject to some superior. Thus, the treaty of peace between Alfred and Guthrum took the shape of a formal contract (*wed*) that was strengthened by the oaths of the high contracting parties.[24] The members of the witan all mutually bound themselves by a formal promise (*wed, vadium*) to the archbishop that every *gerefa* in his own shire should receive the promises of all persons to preserve the peace.[25] In response to the request of the king, the associates of the peace-guilds likewise gave formal promises (*wed, vadium, fides*) that they would do all in their power to see that the king's peace was not broken.[26] After the conclusion of the *wed* and *borh* contract in settlement of the blood-feud all

[21]Aethelred, V, § 22 (Schmid, 224; Liebermann, 242, 243); Aethelred, VI, § 28 (Schmid, 230; Liebermann, 254, 255).

[22]Cnut, I, 19, § 1 (Schmid, 266, 267; Liebermann, 300, 301).

[23]Aethelred, V, 5 (Schmid, 222; Liebermann, 238, 239). The same passage also occurs in Aethelred, VI, 3 pr (Schmid, 226; Liebermann, 248).

[24]Schmid, 106-109; Liebermann, 126 *et seq.*

[25]Aethelstan, VI, 10, 11 (Schmid, 168-171; Liebermann, 181, 182).

[26]*Judicia civitatis Lundoniæ* 8 (Schmid, 164-169; Liebermann, 178-181).

those of either family who were present formally restored the peace that had been broken by the feud. With united hands upon a weapon they all promised the arbitrator (*semend, mediator*) that in the future they would preserve the king's peace.[27] So, too, individual subjects (*hyremann*) in the various shires formally bound themselves by promises to the bishops, ealdormen, and *gerefa,* that they would keep the peace of the king; and these solemn promises were undertaken by oath and by *wed* and *borh.*[28]

The study of Anglo-Saxon dooms and tracts leads one to the conclusion that the formal contract of early English law created a relationship of *debt* as between the parties;[29] but the further question as to the nature of the *liability* growing out of the formal contract is—owing to the fact that the sources do not contain any direct information—a most difficult question to answer. If we turn to the literature of the old Teutonic law on the Continent, we find that the views of legal scholars upon this problem are widely divergent. The prevailing opinion seems to be that the direct result of concluding the formal contract was the *personal* liability (*Personalhaftung*) of the contractor.[30] A second view is that the contract itself created both the *debt* and the *liability;* the liability being however not personal liability, but *property*-liability (*Vermögenshaftung*)—a lien upon all the movable property of the promisor. If the promisor did not perform his contract, the promisee then had the right to distrain upon his movable property.[31]

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[27]*Hú man sceal gyldan twelf-hyndes man* (Schmid, 394-397; Liebermann, 392-395); Edmund, II, 7 (Schmid, 178-180; Liebermann, 188-191); *Leges Henrici Primi* 76, 80 (Schmid, 475, 476, 478; Liebermann, 593, 596).

[28]Aethelstan, VI, 11 (Schmid, 170, 171; Liebermann, 182). Thorpe, Ancient Laws and Institutes of England. p. 101, says, in discussing the word *hyremann* of this passage in Aethelstan: "It is clear from c. 11., that the term is a general application for all persons owing obedience to some superior authority."

[29]On Teutonic law in general see Brunner, *op. cit.*, 180; Puntschart, *Schuldvertrag und Treugelöbnis,* 282 (and the literature cited pp. 10-13); Egger *Vermögenshaftung und Hypothek nach fränkischem Recht,* 396-398. Compare also Puntschart, *op. cit.,* 1-10; Gierke, *Grundzüge des deutschen Privatrechts* (Holtzendorff-Kohler, *Encyklopädie der Rechtswissenchaft,* I, 524); Gierke, *Schuld und Haftung* (1910), 7 *et seq.* Puntschart's view (*op. cit.,* 284-287, 375, 400, 512-518) is that the pledge of faith (*Treugelöbnis*) created, not the debt (*Schuld*) itself, but the personal liability (*persönliche Haftung*) of the contractor.

[30]See, *e. g.,* Puntschart, *op. cit.,* 286, 513. For Puntschart's view in regard to the *debt* itself see note 29, *supra.*

[31]This view is maintained by Egger, *op. cit.,* 400-403, 419-431, 450. Egger admits that personal liability, as well as property-liability, was known to Teutonic law; but he contends that the creation of the debtor's personal liability required a separate transaction, the formal contract of itself creating only the property-liability.

The provoking silence of the sources prevents one from making any definite statement as to the nature of the liability created by the Anglo-Saxon formal contract. We cannot say positively whether the contract gave rise to a personal or to a proprietary liability, or, perchance, to both. It is probable that in a quite early period hostages and sureties assumed a personal liability; but there is also much in the history of the formal contract of post-Conquest times to lead us to think that in the land of the Angles and Saxons, as in the lands of other Teutonic peoples, the formal contract might well have served as the basis for an ultimate distraint, and that it thus created property-liability in the form of a *quasi*-hypothecation of the contractor's goods. The sources of the law after the Norman Conquest show us clearly that the promisor's plighted faith was often placed—apparently by the hand-grasp—in the hands of an official third party, such as the sheriff, who was in a position to enforce the fulfilment of the promise by distraint upon the promisor's goods. So, too, we find that the formal contracts of the common law—the contract under seal and the contract of record—either gave or might give the promisee the right of distress in case of the non-fulfilment of the promise, this distraint usually being carried out by an officer of the court; and it is quite clear that the contract of record, concluded by the enrollment of a promise under seal, effected a lien upon the promisor's goods and thus resulted in property-liability.[32] It is reasonable to suppose that the formal contract of pre-Conquest days—concluded by the delivery of the *wed* or by some other formality—also had the effect of creating property-liability in the shape of a lien upon the promisor's chattels.[33]

Although our sources are silent on some points, they do nevertheless give us a good deal of valuable information in regard to the making, fulfilment, and breach of the formal contract.[34] In an early state of society form appears sometimes to be of much more importance than substance; and certainly in the early Eng-

[32]The goods seem to have been liable only so long as they remained in the hands of the debtor. Apparently the contract of record created a right *in rem* as regards the debtor's lands, but not as regards his goods.

[33]Speaking of Teutonic law on the Continent Egger, *op. cit.*, 400-402, says: "[Haftbar] wird die schuldnerische Fahrhabe. Diese wird symbolisiert durch die Wadia, die ein Teil derselben ist. Mit der Reichung dieses Teils will man die Unterwerfung des Ganzen, dem dieser Teil angehört, also des schuldnerischen Mobiliarbesitzes."

[34]For details the reader may be referred to the writer's longer history of the formal contract. See note 1, *supra*. Unfortunately Gierke's great work on *Schuld und Haftung* (1910) came too late to be taken fully into account in the present paper.

land of Ine and Alfred and Cnut the formal contract played its own significant part in the formal life of the times. Both in public and in private law—if we may apply these terms to the law of the days before William—the formal promise served most useful purposes. It accustomed people to view their own word as something solemn and sacred, and thus it greatly helped in the moral and legal development of the English race. In an age of some violence and a good deal of self-help it did much towards the establishment of peaceful and orderly society. Beginning as a promise binding by reason of the delivery of some material object, the contract proved itself strong enough and flexible enough to grow with the times. Partly owing to the spread of Christian doctrine the contract gradually took to itself the more spiritual forms of the oath, the *god-borh,* and the pledge of faith. It seems to have begun as a unilateral promise—but it early became possible to conclude the contract in the form of a bilateral obligation. Originally serving a few rather special purposes, it ultimately came to be a contractual form that could be employed generally and under almost any circumstances.

By the time of the Norman Conquest the lasting foundations of the English law of contract had been surely and firmly laid. The formal contract of the Anglo-Saxons lived on into the later ages, and powerfully influenced the development of the law even down to the present day. The older formalities continued to exist in the local law; and in the form of the pledge of faith the contract had its importance both in the public and in the private law of the later Middle Ages. Especially in the ecclesiastical courts did the oath and the pledge of faith exercise a dominating influence; and largely owing to the church's claim of jurisdiction over these contracts there came the serious conflicts between the ecclesiastical and the temporal courts that mark the times of Becket and Henry. But with the gradual growth of the common law the line between the contract of the church and the contract of the state became clearly defined. The church courts recognized and enforced formal contracts concluded by oath and by pledge of faith. The state courts would have nothing to do with either of these formalities, and they developed the formal contract along newer lines in harmony with the social growth of the times—they developed the formal contracts of the common law, the contract under seal and the contract of record. The royal courts of justice recognized indeed both kinds of formal contract, but especially

did they recognize the sealing and delivery of a document as formal acts that would have binding contractual force; and, although this formal contract of the common law drew the seal from the court of the Frankish kings and the document of a purely obligatory character from Italian bankers, it may nevertheless be looked upon as a continuation—an adaptation—of the old formal contract of Anglo-Saxon times.[35] It was perhaps but natural that in the common law courts the older forms should make way for the newer and better form. In the later Middle Ages there was also developed the simple contract of the common law; and both this informal contract and the formal contract—either as contract under seal or as contract of record—still survive at the present day and constitute the two kinds of contractual obligations recognized and enforced by the English courts. The history of the informal contract did begin in the period after the Norman Conquest; but the history of the formal contract did not begin with the introduction of the seal from the Continent. It began in the far-off misty days of early Anglo-Saxon custom, and from those days to the year 1910 its history has been unbroken. Transformed from a contract concluded by the delivery of a *wed* to a contract concluded by the delivery of a sealed instrument the English formal contract has still a vigorous life; and for centuries to come it will probably still serve social and economic ends in the domains of the common law.

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[35] Gierke, *Schuld und Haftung*, 186, note 63: "Er [contract under seal] wird durch Uebergabe der versiegelten Urkunde geschlossen und beruht daher wohl auf Fortbildung der Wette."